



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-001359

First-tier Tribunal No: HU/04740/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 25<sup>th</sup> of September 2024

**Before**

**UPPER TRIBUNAL JUDGE MEAH**

**Between**

**AS**  
**(ANONYMITY ORDER MADE)**

**and**

Appellant

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Semega-Janneh, Counsel instructed by Daniel and Baker Solicitors

For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

**Heard at Field House on 12 September 2024**

**DECISION AND REASONS**

**Introduction and Background**

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge O'Brien promulgated on 15 February 2024 ("the decision"). I shall hereon in refer to the parties as they were in the First-tier Tribunal for ease of understanding and to avoid confusion.
2. By the decision, the First-tier Tribunal allowed the appellant's human rights appeal based on his family life with his daughter, against the respondent's decision dated 21 February 2020, refusing his application to for Indefinite Leave to Remain in the UK. The application was refused under the Suitability and Eligibility provisions of the Immigration Rules.

3. The appellant is a Pakistani national. His application to remain was refused under section S-LTR.1.6. of the Immigration Rules as it was deemed his presence in the UK was not conducive to the public good. The following, which is self-explanatory, was stated under the Suitability heading of the respondent's refusal letter issued to the appellant at [7]-[10];

"7. Under paragraph R-LTRP.1.1.(d)(i), your application falls for refusal on grounds of suitability under Section S-LTR.1.6 (character and conduct), as your presence in the UK is not conducive to the public good.

8. The reason for this is, that although you were found not guilty of sexual abuse on the 09/08/2016 in the crown court, a District judge in the family court stated on the 20/07/2017 that " the court found that the father (you), over a period of approximately 3 years from when your son was 8 to 11 years inappropriately and sexually touched your son's penis and bottom". The court found that your son did tell the truth during this interview with the police"

9. The District Judge also revoked all previous access orders and ordered that you be allowed only indirect access to your children via their mother.

10. For this reason your presence in the UK is not conducive to the public good and your application does not therefore satisfy the conditions of S-LTR1.16 furthermore does not satisfy the conditions of paragraph R-LTRPT1.1(d)(i)."

4. The basis of the refusal on Eligibility was that the appellant did not have sole responsibility for his children and he did not have direct access or contact with them. He had also not shown that he had spent 20 years in the UK, and there were no very significant obstacles to his reintegration into Pakistan.

## **The Grounds**

5. The respondent's grounds of appeal to the First-tier Tribunal were as follows:

"The Judge of the First-tier Tribunal has made a material error of law in the Determination.

### Background

The appellant is a national of Pakistan who entered the UK on 19/05/2003 as a visitor.

The appellant did not return and instead applied for leave as a spouse in-country, which led to a grant of Discretionary Leave on 19/02/2009 and a further grant of DL on 25/09/2012. The appellant had applied for Indefinite Leave to Remain but was refused and his subsequent appeal was dismissed on 31/05/2018 with him becoming appeal rights exhausted on 29/01/2019. On 02/07/2019, the appellant applied for further DL but was refused on 21/02/2020 and it is this decision that the appeal has been lodged against.

### Introduction

The appellant's appeal was allowed by First Tier Tribunal Judge (FTTJ) O'Brien who found that although the appellant doesn't

satisfy the Immigration Rules due to suitability in relation to past sexual misconduct against his own son and that he is breaching the Family Court order that only permits indirect contact with his daughter, they believe his subsisting relationship with his daughter outweighs public interest in his removal as per section 117B(6) of the NIAA 2002 (as amended).

1. Making perverse or irrational findings on a matter or matters that were material to the outcome / Making a material misdirection of law on any material matter.

a) It is respectfully submitted that the FTTJ's reasons for allowing this appeal are perverse if not irrational and that their overall decision amounts to a misdirection of law.

b) The FTTJ finds that the appellant did sexually abuse his son when he was a child, as was found by the Family Courts [16]. They also observe that the appellant is breaching the Family Courts Order that only permits indirect contact, as he has regular weekly contact with his daughter [17-22]. However, despite this blatant disregard for UK law, the FTTJ finds that there would be no public interest in his removal because of his relationship with his daughter that they believe cannot subsist through indirect contact [30-32].

c) It is submitted that the FTTJ has failed to undertake a satisfactory assessment of the daughter's best interests in this appeal by giving due weight to the evidence concerning the involvement of Social Services and the Family Courts in preventing the appellant from having direct contact with her. They also fail to scrutinise the evidence of the appellant's ex-partner and son who have seemingly been coerced into supporting his appeal despite the fact he sexually abused his son and their own observation of the CAFCASS evidence that the ex-partner alleged that she was groomed by him into forming their relationship [25] (the ex-partner, from Rochdale, would have been aged 17 at the date their son was born in 2002 whilst the appellant was 33). The ex-partner, despite being aware of the consequences for herself, has been complicit in breaching the Family Courts Order with the appellant and Social Services are in the process of becoming involved again in the family circumstances because of this.

d) It is therefore respectfully submitted that this finding by the FTTJ is materially flawed and cannot stand.

Permission to appeal is respectfully sought.

An oral hearing is requested."

6. Permission to appeal was granted by First-tier Tribunal Judge Pickering on 11 June 2024, in the following terms:

- "1. The application is in time.
2. The grounds of appeal assert that the Judge erred.
3. The grounds of appeal are clearly arguable for the reasons given therein. They need no further elucidation or explanation from me.
4. Permission is granted and the reasons given in the application are clearly arguable as errors."

7. There was no Rule 24 response received from appellant.
8. That is the basis on which this appeal came before the Upper Tribunal.

### **Hearing and Submissions**

9. The hearing was conducted with myself sitting at Field House, whilst the representatives attended via Cloud Video Platform.
10. Both representatives made submissions which I have taken into account and these are set out in the Record of Proceedings.

### **Discussion and Analysis**

11. It will be helpful to set out some of the First-tier Tribunal's key findings under the 'Findings' heading of the decision that lead to the conclusion to allow the appellant's appeal. The following was stated at [16]-[20];

"16. I am not persuaded that it would have been appropriate for me to go entertain what is in effect a collateral attack on the unchallenged findings of the Family Court, a judicial body with expertise in such matters. Even if it were, those findings were made by a specialist judge having heard evidence given by the involved parties much closer to the events than now. That the appellant claims not to have appealed the findings because he could not afford to do so, makes them no less valid. In any event, I find that the appellant has sought today to minimise the conduct in question, has influenced his son (who has now been living with the appellant for 2-3 years) into believing similarly, and has failed to give any innocent explanation for touching his son's bottom in bed (which I accept happened). In short, had I considered it open to me and appropriate to consider departing from the Family Court findings, I would have declined to do so. The appellant, on balance, sexually abused his son and so does not meet the suitability requirements of the immigration rules to succeed either on family life or private life grounds.

17. The latest Family Court order concerning the appellant's contact with his daughter was made on 25 April 2019. That hearing was concerned principally with the appellant's contact with his son, and the recitation to the order recorded as follows:

1. The Court did not take any oral evidence;
2. The Applicant Father wishes to have direct contact with [his daughter, A], subject to her wishes and feelings, the Respondent Mother's consent and/or an order of the Court;
3. The Applicant Father is looking forward to having supervised contact with his son [M], subject to arrangements being made in accordance with the recommendation contained in the Social Worker's Section 7 report;
4. The arrangements for indirect contact between the Applicant Father and [A] as set out in the Order dated 20 July 2017 continue.

18. No order was made, save for leave for the appellant to withdraw his application and detailed assessment of the children's publicly funded costs.

19. The appellant's ex-partner told me that she asked the attending social workers after the hearing whether the appellant could also have supervised contact with his daughter, to be told that it was 'down to her'. She took that as permission to allow the same, and supervised contact started around 4 weeks afterwards. However, no variation to the 20 July 2017 order was applied for or granted.

20. The appellant sees his daughter every Sunday and takes her regularly to school. His ex-partner believes that they are accompanied every time by the appellant's son. However, the appellant's son confirmed that the appellant occasionally takes his daughter to school alone, and I find as a fact that the appellant has regular direct contact with his daughter, which is regularly unsupervised (as I do not accept that the appellant's son is an appropriate individual to supervise contact) and occasionally entirely alone.

12. The First-tier Tribunal then finds at [22], [23] and [25];

"22. Social Services contacted the appellant's ex-partner a few weeks ago and told her that she was in breach of a court order by allowing the appellant direct contact with his daughter. When she explained what had happened outside court in April 2019, she was told that it was nevertheless not in accordance with the contact order.

23. Social Services has since then interviewed the appellant's ex-partner and daughter at home but has not yet interviewed her at school, despite saying they would. I have no doubt that they will....

25. I have the gravest concerns regarding the appellant's motives behind his relationship with the children, noting an allegation made by his ex-partner to CAFCASS in 2018 that he had groomed her so he could remain in the United Kingdom and was similarly grooming their son. However, the respondent was not represented today to put the point to the appellant and so I make no such finding. In particular, I cannot go so far as to find that the relationship between the appellant and his children is not genuine. I do, however, doubt, the degree of anguish the appellant would experience if removed to Pakistan and thereby separated from his children."

13. The First-tier Tribunal then in the 'application of the law to the facts' finds at [29]-[32];

"29. The only court order dealing the appellant's contact with his daughter before me was the order of 25 April 2019, from which the relevant extracts are quoted above. I have not seen the order of 20 July 2017 to which reference is made. However, no one sought to persuade me that the recitation in the 2019 order was incorrect and that the 2017 order made provision for other

than indirect contact only between the appellant and his daughter.

30. He is presently seeing his daughter several times a week albeit in apparent breach of that order. It would appear that steps might soon be taken by Social Services to address the situation. That intervention may result in an application to the Family Court for a more permissive order on the basis that it is now accepted that some direct contact is in A's best interests. On the other hand, Social Services may remain of the view (clearly held by the Family Court when the 2017 order was made) that direct contact is not in her best interests. Cessation of direct contact would, in my judgment, render the appellant's relationship with his daughter no longer subsisting.

31. However, until such steps are taken, I am satisfied on balance that the appellant has for the time being a genuine and subsisting relationship with his daughter. She is a qualifying child who it would be unreasonable to expect to leave the United Kingdom.

32. Therefore, whilst the appellant continues to have direct contact with his daughter there is no public interest in his removal pursuant to s117B(6) of the 2002 Act."

14. I shall deal with the Grounds 1a and 1b together as these are connected. I shall then deal separately with ground 1c.

Grounds 1a and 1b - Irrational findings/Material misdirection of law/Disregard for UK Law/Contact in breach of Court Order going to the question of the public interest

15. The First-tier Tribunal was aware that the contact between the appellant and his daughter, who is a qualifying child for the purposes of section 117B NIAA 2002, now aged 14 years, was in breach of the Family Court Order of 25 April 2019. This was not disputed. Only indirect contact with the daughter was permitted by way of letters on six occasions per year. However, the appeal appears to have been allowed on the First-tier Tribunal's acceptance that there was, despite this breach, nonetheless a genuine and subsisting relationship in existence between the appellant and his daughter arising from the direct contact they had with each other. This led to the First-tier Tribunal's finding that there was therefore no public interest in the claimant's removal pursuant to section 117B(6)(a) of the NIAA 2002 at [31] of the decision.

16. There is a distinct absence in the First-tier Tribunal's decision of any consideration of the complaint raised in ground 1b, namely, that the direct contact between the appellant and his daughter was/is in breach of a court order. This was despite the First-tier Tribunal being conversant with this salient fact which was not in dispute. I therefore accept that it was a misdirection in law to find that there was no public interest in the appellant's removal given the ongoing breach of a court order. This clearly went towards the public interest question which the First-tier Tribunal should have considered as relevant in determining this important factor arising in this appeal given the appellant's past conduct. The failure to do so and/or to carry out any assessment on this is a material error of law. Grounds 1a and 1b are therefore made out.

Ground 1c - Best interests of the appellant's daughter

17. In **SSHD v AB (Jamaica) & Anor [2019] EWCA Civ 661**, Singh LJ said at [100]-[101];

*“100. The Respondent AO was restricted by an order of the Family Court in the contact which he could have with his son R in a very substantial way. Although that can be described as “indirect contact”, in the sense that direct contact was prohibited, it was of a very limited kind even of indirect contact. In essence he was permitted to communicate with his son only by post and, furthermore, those letters, postcards and presents had to be sent to the address of the maternal grandparent and not to R or his mother’s address.*

*101. Furthermore, and crucially, it is important to appreciate the underlying reasons why such a limited order was made. It is clear from the two CAFCASS reports that the recommendation made to the Court was that direct contact should be prohibited because of the Respondent’s history and conduct, for example domestic abuse and inappropriate comments on social media. It is also clear that the very limited contact which was to be permitted was for the purpose of contributing to R’s understanding of his dual heritage identity and not in order to maintain the relationship with his father.” [My emphasis].*

18. Agreeing with Singh LJ in **AB Jamaica** King LJ at [105]-[106], [110]-[111] and at [115] said;

*“105. I would however add a little in relation to Ground 4 of AO (Nigeria) concerning the question of what amounts to a “genuine and substantial parental relationship” for the purposes of section 117B(6)(a).*

*106. I would first respectfully add my endorsement to the emphasis placed by Singh LJ (at para. 98 above) on the undoubted fact that the application of the words “genuine and substantial parental relationship” will depend upon an assessment of the facts in any particular case. As Singh LJ points out, this type of evaluation is highly fact-specific.”*

*110. So far as indirect contact is concerned, it should be borne in mind that the Family Court typically strives to promote regular, unsupervised, face to face contact between a child and his or her parent. If a court limits that contact to indirect contact only, that is because the court, in a decision making process in which the child’s welfare is paramount (Children Act 1989, section 1) has decided that such a significant limitation on the parental relationship is in the best interests of the child in question and the reasons for such a decision having been reached by the judge will be highly relevant to the tribunal’s consideration of section 117B(6)(a).*

*111. Having said that, whilst perhaps more likely, it is by no means inevitable that a tribunal will conclude that a parent has no “genuine and substantial parental relationship” absent direct contact. It may be that there has been a long gap in contact and that indirect contact marks a gentle re-introduction, or that a parent has to show (and is showing) commitment to indirect contact before direct contact can be introduced. Where however a Family Court has made a final order limiting contact to indirect contact, particularly when there is no provision for progression to direct contact, the tribunal should look closely at the reasons*

which led to the court making such a restrictive order. [My emphasis].

*115 In the present case, for the reasons outlined by Singh LJ at para. 100 of his judgment, I would unhesitatingly agree that the Appellant has not established the parental relationship necessary for him to come within the provisions of section 117B(6)(a)."*

19. It is trite that the best interests of a child is a primary consideration when deciding an appeal involving children. This has been numerously stated by the higher courts in a number of cases including most prominently **ZH (Tanzania) v SSHD [2011] UKSC 4**.
20. Firstly, the First-tier Tribunal makes no mention of best interests anywhere in its decision by way of its own assessment on this crucial question, other than to briefly speculate at [30] that potential social services intervention could determine the question on whether or not direct contact between the appellant and his daughter was in the daughter's best interests. The First-tier Tribunal's sole focus is on the appellant and the circumstances pertaining to him. There is also no mention in the decision of **AB Jamaica**, even though it was arguably the most relevant authority to its consideration of the matters arising in this appeal.
21. Secondly, it should have been clear from the evidence placed before the First-tier Tribunal, which was set out in its decision, that it was therefore necessary to carry out a proper fact sensitive assessment of all of the circumstances before making its finding on the existence of a genuine and subsisting parental relationship, given that it had accepted that there were serious concerns raised about the claimant's conduct towards his children, and by its own rejection of claims by the claimant's son and the son's mother to minimise and/or to alleviate those concerns.
22. The First-tier Tribunal therefore further materially erred in law by failing to first consider the best interests of the daughter as a primary consideration in the context of the direct contact she had with the appellant which was in breach of a court order, and whether such contact was, therefore, capable of constituting a genuine and subsisting relationship for the purposes of section 117B(6)(a).
23. Thirdly, the First-tier Tribunal also materially erred in law by accepting the appellant had a genuine and subsisting relationship with his daughter simply by measure that there was direct contact between them, without first considering whether it was in the daughter's best interests to have such direct contact with the appellant, given that this was in breach of an extant court order. It was therefore also a material error to conclude, absent such consideration, that it would be unreasonable for the daughter to leave the UK.
24. In other words, the assessment of the daughter's best interests in relation to the direct contact she was/is having with the appellant should have been determined first as a primary factor. This would also include assessment of the substance and the qualitative nature of the relationship, which would then undoubtedly have informed the question as to whether the relationship between the appellant and his daughter would or could ever be deemed as being a genuine and subsisting relationship on the grounds that the contact relied upon was in breach of a court order. Only after this question was answered, and in the unlikely event that the answer was in the affirmative, given the specific facts in this case which were not confined to the breach of the court order,



would the question arise as to whether or not it would be reasonable for the daughter to leave the UK in order to continue to enjoy any genuine and subsisting relationship she was found to have with the appellant.

25. I find that it was, therefore, a material error of law for the First-tier Tribunal to have concluded, without any fact sensitive assessment as envisaged in **AB Jamaica**, before making the finding that the appellant had a genuine subsisting parental relationship with his daughter and that it would be unreasonable for the daughter to leave the UK.

26. Accordingly, the Upper Tribunal interferes only with caution in the findings of fact by a First-tier Tribunal which has heard and seen the parties give their evidence and made proper findings of fact. Unfortunately, that is not the position here. The First-tier Tribunal decision was vitiated by material errors in the way that it approached the question on whether the appellant had a genuine and subsisting parental relationship with his daughter, and the premise upon which it allowed the appeal. These amounted to material errors of law.

27. I have accordingly considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement and **Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC)**.

28. I consider, however, that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process. I also note that there is mention at [30] of the First-tier Tribunal's decision of further involvement of social services with the appellant's daughter hence it is only fair for this matter to be remitted to the First-tier Tribunal so that any new up to date evidence, including any new evidence from social services involvement and/or interventions, can be considered at a de novo hearing.

### **Notice of Decision**

29. The respondent's appeal is allowed.

30. The decision of the First-tier Tribunal allowing the appellant's appeal, sent to the parties on 15 February 2024, involved the making of a material error of law. It is set aside in its entirety.

31. The appeal is remitted back to the First-tier Tribunal sitting at Manchester to be heard by any First-tier Tribunal Judge other than Judge O'Brien.

### **Anonymity**

32. The Anonymity Order made by the First-tier Tribunal is maintained.

**S Meah**  
**Judge of the Upper Tribunal**  
**Immigration and Asylum Chamber**

**23 September 2024**